HJ WAN HABIB SYED MAHMUD & ANOR A

v.

THE STATE GOVERNMENT OF SARAWAK

HIGH COURT SABAH & SARAWAK, KUCHING B
DAVID WONG DAK WAH JC
[SUIT NO: 22-150-2002-III (II)]
26 FEBRUARY 2007

STATUTORY INTERPRETATION: *Construction of statutes - Legislative intent - Pension benefits - Former Members of State Legislative Assembly - Monthly salary of serving Members revised and increased - Whether ex-Members entitled to corresponding increase in pension - Members of the Administration and Members of Dewan Undangan Negeri (Remuneration, Pensions and Gratuities) Ordinance 1980 [Sarawak], s. 3, regs. 20(1) & (3) of First Schedule thereof - Members of the Administration and Members of Dewan Undangan Negeri (Remuneration, Pensions and Gratuities) (Amendment) Ordinance 1992 [Sarawak], s. 2* C D

The plaintiffs, as ex-members of the Sarawak State Legislative Assembly ('DUN'), had been receiving monthly pensions pursuant to s. 3 of the Members of the Administration and Members of Dewan Undangan Negeri (Remuneration, Pensions and Gratuities) Ordinance 1980 ('the Principal Ordinance') read with regs. 20(1) and (3) of the First Schedule thereof. In 1992, the Principal Ordinance was amended *vide* Members of the Administration and Members of Dewan Undangan Negeri (Remuneration, Pensions and Gratuities) (Amendment) Ordinance 1992 ('the Amendment Ordinance 1992'). The effect of the amendment was that, as of 1 June 1992, by virtue of s. 2 of the Amendment Ordinance 1992, the monthly salary of members of DUN was revised upwards to RM3,000 from RM2,000 per month previously. The plaintiffs alleged that they were, by reason of the revision, entitled to an appropriate increase in their respective monthly pensions, and in the circumstances applied to the State Government in 2002 to recompute their pensions accordingly. The State Government refused to oblige, taking the stand that, notwithstanding the revision, the plaintiffs were not eligible to any increase in their pensions. Dissatisfied, the plaintiffs commenced the present suit claiming for declarations that they were entitled to the pension increment. The issues that arose were: (i) whether the plaintiffs' pensions could not be revised since the revised salary had not E F G H I

A been backdated by the Amendment Ordinance 1992; (ii) whether the law applicable was that of the new amendment to reg. 20(1) that came into force on 1 January 2003 ('2003 amendment'), with the result that a direction of the Yang di Pertua Negeri must first be sought and obtained before any recomputation of the pension
B of an ex-Member of the DUN could be affected; and (iii) whether the plaintiffs' claims were barred by the Sarawak Limitation Ordinance (Cap. 49) ('Limitation Ordinance').

Held (granting declarations):

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(1) Regulations 20(1) and (3) used the words "shall be adjusted" and made it clear that "whenever" there is a revision of salary of the members of the DUN, the salary on which a pension is calculated shall be readjusted to the revised salary as
D appropriate. There is no proviso to say that the pension can only be revised if the revised salary has been backdated to the period within the plaintiffs' reckonable period of service, as contended by the defendant. Further, once a member of the DUN is given a pension, he has obtained a vested right for life and with it the right to have the pension adjusted
E whenever there is a revision of the salary of members of the DUN. (paras 15 & 16)

(2) The plaintiffs' claims were filed in 2002 and therefore prior to the coming into force of the 2003 amendment. But, even if
F the claims were filed in 2003, it would not have mattered as they were relying on legislations that were applicable to them. In any case, the fact that the State Parliament had to amend regs. 20(1) and (3) to take effect in 2003 could only fortify the court's conclusion that whenever there is a revision of the
G salary of DUN members, there is an automatic recomputation of the pensions of ex-DUN members. For, with the 2003 amendment, such automatic recomputation was taken away and any recomputation is now left with the discretion of the Yang di Pertua Negeri. (para 17)

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(3) The statutory duty to compute starts whenever there is a revision of the salary of members of DUN and with it the duty to pay the recomputed pension. Thus, time starts to run when there is a breach of the statutory duty to pay. On the
I pleadings, the plaintiffs' claims were filed within the prescribed six year period and were not caught by the Limitation Ordinance. (paras 22 & 23)

(4) The relief sought is granted to the extent that the first plaintiff is entitled to have his pension recomputed to RM1,500 per month from RM1,000 per month previously, while the second plaintiff to RM1,208.33 per month from RM819.44 per month previously. However, prayers (II)(b) of the first plaintiff and (III)(c) of the second plaintiff which required the court to pronounce an **"order directing the defendant to pay",** being applications for mandamus, are disallowed. The court, at this juncture, does not have the power to give such orders. (paras 24 & 25)

Case(s) referred to:

Hj Wan Othman & Ors v. Government of the Federation of Malaya [1965] 2 MLJ 31 ***(refd)***

Legislation referred to:

Government Proceedings Act 1956, s. 33(4)

Members of the Administration and Members of Dewan Undangan Negeri (Remuneration, Pensions and Gratuities) Ordinance 1980 [Sarawak], s. 3, First Schedule

Members of the Administration and Members of Dewan Undangan Negeri (Remuneration, Pensions and Gratuities) (Amendment) Ordinance 1992, s. 2

For the 1st plaintiff - Wong Ho Leng; M/s Wong Hong Leng & Co
For the 2nd plaintiff - Chong Siew Chiang; M/s Chong Brothers
For the defendant - Thomas Akin Jelimin; State Legal Officer

Reported by WA Sharif

JUDGMENT

David Wong Dak Wah JC:

[1] This matter in my view only concerns the interpretation of reg. 20(1) and (3) of the First Schedule of the Members of the Administration and Members of Dewan Undangan Negeri (Remuneration, Pensions and Gratuities) Ordinance 1980 as the facts are undisputed, which facts are these.

[2] The 1st plaintiff was a member of Dewan Undangan Negeri Sarawak ("DUN") from 11 June 1977 to 12 March 1987, having completed 115 months reckonable service. The 2nd plaintiff was a member of Dewan Undangan Negeri Sarawak (DUN) from

28 August 1974 until 10 August 1979 having completed 59 months reckonable service. By virtue of their services, they were granted pensions pursuant to s. 3 of the Members of the Administration and Members of Dewan Undangan Negeri (Remuneration, Pension and Gratuities) Ordinance 1980, which came into force on 1 July 1980 (The Principal Ordinance 1980).

[3] The 1st plaintiff has received his monthly pension of RM1,000 since his ceasing as a member of DUN on 12 March 1987 and the 2nd plaintiff has received his monthly pension of RM819.44 since 1 July 1980.

[4] Since 1 June 1992, the monthly salary of a member of DUN had been revised upwards to RM3,000 from RM2,000 per month by virtue of s. 2 of the Members of the Administration and Members of Dewan Undangan Negeri (Remuneration, Pensions and Gratuities) (Amendment) Ordinance 1992 which came into force on 1 June 1992 ("The (Amendment) Ordinance 1992").

[5] The 1st and 2nd plaintiffs as former members of DUN wrote to the Secretary of DUN seeking for a recomputation of their respective pensions *vide* letters dated 12 August 2002 and 12 July 2002 respectively, and the Acting Secretary of DUN, acting for the defendant through his letters dated 2 August 2002 and 11 September 2002 respectively, informed the plaintiffs that they were not eligible for the recomputed pension despite salaries of the Members of DUN being increased to RM3,000 per month under reg. 20 of the First Schedule to the Principal Ordinance 1980.

[6] The 2nd plaintiff's highest drawn salary when he ceased to be a Member of DUN on 10 August 1979 was RM1,000 per month, but the salary on which his pension was calculated, is based on RM2,000.

[7] Because of this refusal to recompute, the plaintiffs took out this suit and made the following claims:

[8] Jointly claimed by both plaintiffs:

1. A declaration that the plaintiffs, having been ex-members of the Dewan Undangan Negeri Sarawak (the DUN) and, having been in receipt of their monthly pensions respectively pursuant to Regulation 3 of the First Schedule to the Members of the Administration and Members of Dewan Undangan Negeri (Remuneration, Pensions and Gratuities) Ordinance, 1980 after their ceasing as Members of "the

DUN", were and are entitled to have their respective pensions recomputed based on the revised salary of RM3,000.00 per month in the manner prescribed by the provisions of the said Regulation, and were and are entitled to be paid such recomputed pensions with effect from 1st June 1992 (the effective date of the coming into force of the revised salaries under Section 2 of the Members of the Administration and Members of Dewan Undangan Negeri (Remuneration, Pensions and Gratuities) (Amendment) Ordinance, 1992) (hereinafter referred to as "the Amendment Ordinance 1992").

[9] For the 1st plaintiff, the claims are as follows:

(II) (a) A declaration that the 1st plaintiff, having been a member of the Dewan Undangan Negeri Sarawak, (the DUN) on 11 June, 1977, and having been in receipt of his pension of RM1,000.00 per month since his ceasing as a member of the DUN on or about 12th March, 1987, was and is entitled to have his pension recomputed based on the revised salary of RM3,000.00 per month which amounts to RM1,500.00 per month, and was and is entitled to be paid by the defendant such recomputed pension of RM1,500.00 as from 1st June, 1992;

(b) An order directing the defendant to pay the 1st Plaintiff the recomputed pension of RM1,500.00 per month as from 1st June, 1992 or from such other date to the date up to such date as this Honourable Court may think fit and just, less the amount of pension of RM1,000.00 per month which has been paid by the defendant to the 1st Plaintiff;

(c) Interests;

(d) Costs.

[10] For the 2nd plaintiff the claims are as follows:

(III) (a) A declaration that the 2nd plaintiff, having been a Member of the Dewan Undangan Negeri Sarawak, (the DUN) on 28 August, 1974, and having been in receipt of his pension of RM819.44 per month since his 1st July, 1980 after his ceasing as a member of "the DUN" on 10-8-1979 was and is entitled to have his pension recomputed based on the revised salary of RM3,000.00 per month which amounts to RM1,208.33 per month, and was and is entitled to be paid by the defendant such recomputed pension of RM1,208.22 as from 1st June, 1992;

(b) A declaration that the 2nd plaintiff is entitled to receive the medical facilities on such terms and conditions like only other ex-members has enjoyed as specified by the Yang di-Pertua Negeri Sarawak.

(c) An order directing the defendant do pay the 2nd plaintiff the recomputed pension of RM1,208.33 per month or such other sum as from 1st June, 1992 or from such other date up to the date as this Honourable Court may think fit and just less the amount of pension of RM819.44 per month which has paid by the defendant to the 2nd Plaintiff.

(d) Interests;

(e) Costs.

Issues

[11] Whether the plaintiffs, being ex-members of DUN and having been granted the pensions under reg. 3 of the First Schedule to the Principal Ordinance 1980, are entitled to a corresponding increase of their pensions under s. 2 of the Amendment Ordinance 1992, when the salary of Members was revised upwards to RM3,000 from RM2,000 per month?

The Law

[12] Regulation 20(1), (2) & (3) read as follows:

20(1) Whenever the salaries of Members are revised, the salary on which a pension (granted under reg. 3) or a derivative pension (granted under regulation 6, 7 or 8 is based shall be adjusted to the revised salary as appropriate and the pension recomputed accordingly.

20(2) The recomputed pension under paragraph (1) shall be payable with effect from the coming into force of the revised salaries.

20(3) In the case of a person who, before the coming into force of the Ordinance, ceased to be a member and he or his dependant is in receipt of a pension or derivative pension, as the case may be, the grant of the pension or derivative pension shall be governed by the provisions of these Regulations and the salary on which a pension granted under regulation 3 or a derivative pension granted under regulation 6,7 or 8 is based shall be adjusted to the salary

> of a Member as appropriate and the pension or derivative pension shall be recomputed accordingly and be payable with effect from the date of the coming into force of the Ordinance and thereafter such pension or derivative pension shall be recomputed and payable in accordance with paragraphs (1) and (2) whenever there is a revision of salaries.

[13] The first matter which I wish to deal with is the position of the 2nd plaintiff in the context of reg. 20(3). Reading the just mentioned regulation, there is no doubt in my mind that the 2nd plaintiff's position is as described therein, that is he is a person who ceased to be a member before the coming into force of The (Amendment) Ordinance 1992 and also in receipt of a pension.

[14] Secondly, it is to be noted that the defendant had during the hearing conceded to prayer III(a) of the 2nd plaintiff's statement of claim.

[15] Thomas Akin Jelimin's (Senior State Legal Officer) contentions:

1. Revised Salary Must Be Backdated

Mr Jelimin submitted that the plaintiff' pension can only be revised if the revised salary had been backdated to the period within their reckonable period of service ie when they were members of the DUN. I am not quite sure of the reasons Mr Jelimin based his contention on. Regulations 20(1) and (3) are quite clear and it is that "whenever" there is a revision of salary of members of the DUN, the salary on which a pension is calculated shall be readjusted to the revised salary as appropriate. There is no proviso to say what Mr Jelimin has contended. Accordingly I reject the contention.

2. Pension Is A Privilege And Not A Right; Hence Any Recomputaion Is Also A Privilege

Mr Jelimin on this contention relies on the case of *Haji Wan Othman & Ors v. Government of the Federation of Malaya* [1965] 2 MLJ 31 where Suffian J (as he then was) held that "the whole tenor of the pensions legislation is permissive and no officer has therefore an absolute right to pension".

He further refers to s. 8 of the Members of the Administration and Members of Dewan Undangan Negeri (Remuneration, Pensions and Gratuities) Ordinance 1980, which provides:

> A member may be granted such pension, gratuity or other benefits as are prescribed in the Regulations contained in the First Schedule.

[16] I have no problem with the submission except that once a member is given a pension, he or she has obtained a vested right for life and with it the right to have the pension adjusted whenever there is a revision of the salary of a member of the DUN. There is no dispute in this case that both plaintiffs had been in receipt of their pensions since they ceased to be members of the DUN. The language of regs. 20(1) and (3) are clear as the words "shall be adjusted" are used.

[17] Mr Jelimin however further submitted that the applicable law in this case should be the law as it exists now. That law is the new amendment to regs. 20(1) (effective from 1 January 2003) (2003 amendment) which requires a direction from the Yang di-Pertua Negeri before the pension of an ex DUN member could be recomputed. Again I am not sure on what basis did he ground this submission on. The law is clear and it is this. Unless there are clear words in the legislation, the same must be interpreted prospectively and not retrospectively. With respect, the cases cited by Mr Jelimin in encl. 100 are not relevant and hence do not bind me. In any event the plaintiffs' claims were filed sometime in 2002 when the 2003 amendment had not been in force. Even if the plaintiffs' claims were filed after 2003, it would not have mattered as they were relying on legislations which were applicable to them. Accordingly I reject this contention. It is also my view that the fact that the State parliament had to amend regs. 20(1) to take effect in 2003 fortifies my conclusion that whenever there is a revision of the salary of DUN members, there is an automatic recomputation of the pensions of ex DUN members. With the 2003 amendment, such automatic recomputation is taken away and any recomputation is now left with the discretion of the Yang di-Pertua Negeri.

3. Highest Drawn Salary

The submission as I understand it is that pension of all DUN members must be based on their highest drawn salary. Mr Jelimin relied on reg. 3(2) which states as follows:

> The monthly pension payable under paragraph (1) shall be based on the highest drawn salary of the Member during any period of reckonable service and …

In the joint submission of Mr Wong Ho Leng and Mr Chong Siew Chiang, learned counsels for the plaintiffs at pp 7-8 encl. 91) said:

> The fact that the Plaintiffs' pension granted under reg. 3 is based on the highest drawn salary of the Member during any period of reckonable service has no bearing with regard to the recomputation of pension under reg. 20 because the same words (highest drawn salary) do not appear in reg. 20. The phrase (highest drawn salary) is only for purpose of calculating the amount of pension payable to the Member under reg. 3 when the person ceased to be a Member having completed 36 months reckonable service. The right of a Member to recomputation of pension referred to in reg. 20 arises, whenever there is a revision of salaries of Members. Reg. 20(1) regulates that whenever the salaries of Members are revised, the salary on which a pension granted under reg. 3 is based, shall be adjusted to the revised salary of Member and the pension recomputed accordingly.

[18] I prefer the submissions of learned counsels for the plaintiffs for the simple reason that there is no express or implied linkage between regs. 3(2) and 20(1), (3).

4. Mandamus And Declaration

Mr Jelimin submitted that the plaintiffs should have pursued their claims by way of an order of mandamus as they were seeking to enforce a statutory duty of the defendant. Further he submitted that the plaintiffs' application for a declaration was also wrong as they did not have an absolute right for recomputation at the time of trial as any recomputation requires a direction from the Yang di-Pertua Negeri.

In respect of the submission on not applying for an order of mandamus, I do not agree. The plaintiffs must first establish their rights before any enforcement of the statutory duty can be taken. In the instant case, the defendant had disputed the plaintiffs' rights to recomputation of their pension and it is only proper that they have their rights determined first before any action can be taken.

As for whether or not this court should grant the declaration, I am fully aware that it is a discretionary power. Firstly, let me say that for reasons stated earlier in my judgment, I disagree with Mr. Jelimin's submission that the 2003 amendment should be taken into account in deciding whether or not to grant the declaration.

One of grounds which Mr Jelimin urged this court to take into consideration is at p 26 of encl. 88 which states as follow:

> If the court were to order payment of all the recomputed pensions which the Plaintiffs alleged were accrued to them, a substantial amount (covering re-computed pension from 1992 to 2006) would have to be paid out to the Plaintiffs and other ex-Dewan Members who are in a position similar to that of the Plaintiffs), would have to be paid out of the Consolidated Fund of the State in one lump sum. Such payment would have some adverse impact on the State's financial position which would not have been felt if the payments were made on a monthly or regular basis or when the accrued amount is much less, to the Plaintiffs and other ex-Dewan Members like the Plaintiffs. In these circumstances, as the Plaintiffs have slept on their alleged "rights" for so long without pursuing legal remedies to enforce what they alleged to be their rights to re-computation and adjustment of their pensions, this Honourable Court should decline to exercise its discretion in favour of the Plaintiffs and ought therefore, to dismiss this action as the Defendant had prayed for in para. 16 of the Defence.

Learned counsel here had not produced any evidence to show that the defendant would suffer financially or is not in a position to pay the plaintiffs or other ex DUN members should I rule in favor of the plaintiffs. The presumption of the law must be that all State Governments in Malaysia are solvent and always in a position to honor its statutory duties. That presumption is the reason why we have laws prohibiting enforcement of judgment for payments against the government. (see s. 33(4) of the Government Proceedings Act 1956). That being the case, I will not take that into consideration in my deliberation.

[19] The question of the plaintiffs' sleeping on their rights does not arise as there is the Limitation Ordinance of Sarawak (Cap. 49) which would punish any litigants sleeping on their rights. In any event the plaintiffs had written to the defendant on various occasions and it was only when they were informed that there would be no recomputation that they resorted to this action. This brings me to the next issue.

[20] Whether the plaintiffs' claims or any part thereof are barred by the provision of the Limitation Ordinance of Sarawak (Cap. 49) (Limitation Ordinance)?

[21] It is the plaintiffs' contention that the Limitation Ordinance does not apply and their reasons are these. As the 2003 amendment only came into effect on 1 January 2003, the period of limitation only applies after that date. Further it is submitted that the present action is a case of non-feasance and the duty to recompute the pension is a mandatory one and a continuing duty. The failure to compute is thus a continuing breach and a fresh period of limitation starts to run after every breach. Also it is submitted until the defendant makes a final stand on the recomputation, time does not start to run.

[22] With respect, I disagree with the reasons put forth by the plaintiffs' counsels. The statutory duty to recompute starts whenever there is a revision of the salary of members of DUN and with it the duty to pay the recomputed pension. Thus the limitation period starts when there is a breach of the statutory duty to pay. After perusing the Limitation Ordinance, the applicable item in my view is item 97 which states as follows:

97.	*Suit for which no period of limitation is provided elsewhere in this schedule*	...	6 years	When the right to sue accrues.

[23] It is clear from the pleadings that the plaintiffs' claims are within the six year period and as such those claims are not caught by the Limitation Ordinance.

[24] Before I make the final orders, I wish to state that prayers (II)(b) of the 1st plaintiff and (III)(c) of the 2nd plaintiff which require me to pronounce an "order directing the defendant to pay ..." amounted to a mandamus. At this juncture, this court does not have the power to give such orders. The plaintiffs must first

obtain a certificate under s. 33 of the Government Proceedings Act 1956 and then present it to the defendant for payment, upon which the defendant under s. 33(3) of the Government Proceedings Act 1956 "shall pay the amount stated in the certificate".

[25] That being the case and for reasons stated above, I grant the following reliefs:

For the 1st plaintiff:

1. A declaration that the 1st plaintiff, having been a member of the Dewan Undangan Negeri Sarawak, (the DUN) on 11 June 1977, and having been in receipt of his pension of RM1,000 per month since his ceasing as a member of the DUN on or about 12 March 1987, was and is entitled to have his pension recomputed based on the revised salary of RM3,000 per month which amounts to RM1,500 per month, and was and is entitled to be paid by the defendant such recomputed pension of RM1,500 as from 22 November 1996;

2. That the defendant pay to the 1st plaintiff the recomputed pension of RM1,500 per month as from 22 November 1996 less the amount of pension of RM1,000 per month which has been paid by the defendant to the 1st plaintiff (judgment sum);

3. Interests of 4% per annum on the judgment sum from 21 November 2002 (date of writ) to the date of judgment;

4. Statutory interests of 8% per annum on the judgment sum from the date of judgment until the full and final settlement of the judgment sum;

5. Costs to be taxed unless agreed to the 1st plaintiff.

For the 2nd plaintiff:

1. A declaration that the 2nd plaintiff, having been a Member of the Dewan Undangan Negeri Sarawak, (the DUN) on 28 August 1974, and having been in receipt of his pension of RM819.44 per month since his 1 July 1980 after his ceasing as a member of "the DUN" on 10 August 1979 was and is entitled to have his pension recomputed based on the revised

salary of RM3,000 per month which amounts to RM1,208.33 per month, and was and is entitled to be paid by the defendant such recomputed pension of RM1,208.33 as from 22 November 1996;

2. A declaration that the 2nd plaintiff is entitled to receive the medical facilities on such terms and conditions like other ex-members has enjoyed as specified by the Yang di-Pertua Negeri Sarawak;

3. That the defendant pay to the 2nd plaintiff the recomputed pension of RM1,208.33 per month as from 22 November 1996 less the amount of pension of RM819.44 per month which has paid by the defendant to the 2nd plaintiff (judgment sum);

4. Interests of 4% per annum on the judgment sum from 21 November 2002 (date of writ) to the date of judgment;

5. Statutory interests of 8% per annum on the judgment sum from the date of judgment until the full and final settlement of the judgment sum;

6. Costs to be taxed unless agreed to the 2nd plaintiff.

[26] Finally I wish to state that in the midst of concluding my judgment, I was referred by Mr Chong Siew Chiang to the unreported case of *Andrew Nyabe & 3 Others v. Secretary Dewan Undangan Negeri Sarawak & 1 Other* where Clement Skinner J had considered similar issues. I have had the chance of reading the learned judgment of His Lordship and take great comfort of the fact that his interpretation of the relevant legislations is similar to mine.